**AMARJIT SINGH SIDHU**

**v.**

**TAN SIEW ENG & ANOR.**

HIGH COURT MALAYA, MALACCA
WAN YAHYA J
[ORIGINATING SUMMONS NO. 88 OF 1983]
16 MARCH 1988

***TRUSTS:*** *Deductions for expenses incurred - Whether can be made from the estate - Whether sums for tax payable by estate of deceased should be withheld.*

***CIVIL PROCEDURE:*** *Making of supplemental order - Whether Court has power.*

The Court had by an earlier order ordered that a portion of a disputed estate property be distributed to the beneficiaries concerned. The defendants as executors and trustees of this estate deducted a certain sum from this portion towards payment of expenses incurred and the estimated tax payable by the estate of the deceased. The deductions and payments made by the defendants were not provided for in the earlier order and they therefore applied to the Court for a supplemental order to regularise these deductions and payments.

Two (2) issues were raised, namely:

(i) whether the expenses claimed by the defendants were properly incurred; and

(ii) whether the Court can make the supplementary order as prayed.

**Held:**

**[1]** Applying *Sharp v. Lush* the expenses being "executorship expenses" i.e. expenses incident to the proper performance of the duty of the executor including costs incurred by the executor in relation to the same were properly incurred.

**[2]** The executors and trustees were right in withholding the estimated sum due for income tax but the executors and trustees must exercise due care to see that this sum wherever possible be invested in short term deposits.

**[3]** The Court has the power to make a supplemental order upon proof of new facts to ratify a mere omission irregularity by the defendant to obtain prior approval for what would have otherwise been lawful expenditure.

**Cases referred to:**
*Sharp v. Lush [1879] Ch D 468*
*In re Scowby [1897] 1 Ch 741*
*Ford Hunt v. Raghbir Singh [1973] 1 WLR. 738*

*For the applicant/defendant - Kang Ai Lin; M/s. Chooi & Co.*
*For the respondent/plaintiff - Sukhdev Singh; M/s. Jagjit Singh & Co.*

**JUDGMENT**

**Wan Yahya J:**

This appeal originates from part of an earlier order made by this Court on 26 February 1985 wherein it was ordered that a portion of disputed estate property i.e. the difference between the sum of RM359,291.29, together with accrued interests and the sum of RM280,000 be distributed to the beneficiaries in proportion to their shares.

Payments to the beneficiaries were however withheld for a considerable period until 26 June 1986 when the plaintiff took out a summons-in-chambers for an order to the defendants to comply with the earlier order. According to the defendants, payments had been postponed to enable them to obtain full interest on maturity of the money which had been placed in fixed deposits. They claimed that the plaintiff's solicitor was aware of the reason. Anyway distribution to the beneficiaries was eventually made on 2 January 1987. The sum so distributed however become another subject of dispute when it was disclosed that the defendants had made deduction from the balance sum of RM111,219.29 the difference between RM391,219.29 and RM280,000.

As the defendants had overlooked to secure the provision for these expenditures in the earlier order of the Court dated 26 February 1985, they sought a supplemental order from this Court to regularise these payments. Their application was objected to by the plaintiff on the ground that the consent of the original plaintiff should have first been obtained, and in the event of her refusal, the Court's permission, before incurring the expenses.

The two issues emanating from the arguments are firstly whether the expenses claimed by the defendants had been properly incurred and secondly whether the Court is empowered to make the supplemental order as prayed.

The first issue involves the deductions made for the following expenditure:

(a) Bill No. 9/83 dated 24 February 1983 for RM506.50 from Coopers & Lybrand marked "ESC -11";

(b) Bill No. 14/85-86 dated 23 September 1985 for RM6,180.50 from Coopers & Lybrand marked "ESC-12';

(c) Bill No. 18/85 dated 12 April 1985 for RM2,200 from Barbinder & Co. Sdn. marked "ESC-13";

(d) Bill No. 54/85 dated 19 June 1985 for RM1,000 from Barbinder & Co. Sdn. marked "ESC-14";

(e) Bill No. 3/85-86 dated 23 September 1985 for RM1,256 from Barbinder & Co. Sdn. marked "ESC-15";

(f) Letter dated 23 August 1985 from Coopers & Lybrand advising that the estimated tax payable by the Estate of Ee Yew Kim, deceased for the years of assessment 1976 to 1985 is the sum of RM9,291.06 marked "ESC-16".

Except for the first item, the plaintiff disputed the rest of these expenditure but beyond saying that the payments were unlawful, they were unable to show if the sums involved were incorrect, unreasonable or improperly incurred. A case in point with regards to (b) to (e) the present predicament is *Sharp v. Lush* [1879] Ch D 468 in which it was held that:

> The term "executorship expenses" in a will means expenses incident to the proper performance of the duty of an executor, and includes costs incurred by executors in obtaining the advice of solicitors or Counsel as to the distribution of their testator's estate; also the costs of the executors and other parties in an action, whether instituted by the executors themselves or by a beneficiary, for the administration of the testator's personal estate; also expenses incurred by the executors for the protection of specific legacies - as, for instance, for warehousing furniture specifically bequeathed - pending the distribution of the assets; and payments by the executors in discharge of debts falling due from the testator's estate after his death - as, for instance, rent due after the testator's death for a house of which he was tenant from year to year.

As regards the amount disclosed in (f) I am of the view that the sum was rightly withheld from the plaintiff and the other beneficiaries pending the computation of income tax payment. Of course as executors and trustees, the defendants must exercise due care to see that the money wherever possible be invested in short term deposits.

The second issue appertains to the power of this Court to ratify by way of supplemental order, a mere ommissional irregularity by the defendant to obtain prior approval for what would have otherwise been lawful expenditure. As observed earlier the defendant would have in normal circumstances been entitled to deduct all the expenses incurred by them as trustees. Somehow they missed the significance of this issue at the time when the order for distribution was made. There is no doubt that I would have, on the basis of the evidence now produced, sanctioned the expenditures if so requested. *In re, Scowby* [1897] 1 Ch 741 it was held that the High Court has jurisdiction to make upon proof of new facts an order supplemental to an original order. Similarly in *Ford Hunt v. Raghbir Singh* [1973] 1 WLR 738 Brightman J observed that:

> There is no doubt, if the plaintiffs had asked, an inquiry as to damages would have been added to the order for specific performance. The question is whether an inquiry can be directed now.

These cases are not directly on fours with our present application but to my mind they are nevertheless persuasive authorities to move me into making this supplemental order. Whatever inconvenience caused to the plaintiff in this case has been compensated by costs.

Also found at [1989] 1 CLJ 11